No. 95454-2

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

DORCUS ALLEN,

Respondent.

ON DISCRETIONARY REVIEW FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. INTRODUCTION

Where a jury has reached a unanimous verdict on a factual question in a prior trial involving the same parties, the party against whom the verdict was entered cannot seek to relitigate the issue. Here, a unanimous jury in Dorcus Allen's first trial returned special verdicts answering "No" to the question of whether the State had proved two aggravating circumstances beyond a reasonable doubt. After this Court reversed Mr. Allen's convictions due to the egregious misconduct of the prosecutors, the trial court granted a defense motion to prevent the State from relitigating the aggravating factors.

The State sought discretionary review in the Court of Appeals. The State did so despite its inability to offer any authority that permits, much less requires, a trial court to ignore a previous jury's special verdict resolving a factual issue against the State. As the Court of Appeals recognized, controlling precedent fully supports the trial court's ruling.

B. ISSUE PRESENTED

Where a prior jury verdict unanimously concluded the State did not prove a fact beyond a reasonable doubt, is the State free to retry a person on that fact?

C. STATEMENT OF THE CASE

The State charged Mr. Allen "with the crime of Aggravated First Degree Murder." CP 817-20.

A jury acquitted Mr. Allen of all four counts of aggravated first degree murder. CP 35-38. On each count, the jury was asked return special verdicts answering whether the State proved two aggravating elements under RCW 10.95.020.[1] CP 35-38. For both elements, each special verdict form asked the jury, "Has the State proven the existence of the following aggravating circumstance beyond a reasonable doubt?" Each time the jury answered "No." *Id*. The trial court polled the jury separately asking each juror whether the verdict was that of the jury and whether it was the juror's individual verdict. CP 14-51. Each juror answered "yes." *Id*.

The jury, convicted Mr. Allen of four counts of first degree murder, each with a firearm enhancement, and found the State proved aggravating factors that permitted an exceptional sentence under RCW 9.94A.535. CP 31-34, 39-46. The trial court imposed an exceptional sentence of 420 years.

Mr. Allen appealed his convictions contending, among other issues, the prosecutors repeatedly misstated the law in their closing

[1] A jury finding of an aggravator under RCW 10.95.020 requires a minimum sentence of life without the possibility of parole. RCW 10.95.030. Aggravating factors under RCW 9.94A.535 permit a court to impose an exceptional sentence above the standard range. RCW 9.94A.537.

arguments requiring a new trial. The State conceded its repeated misstatements of the law were improper. *State v. Allen*, 182 Wn.2d 364, 374, 341 P.3d 268 (2015). Noting that misstating the law on a critical issue in the case is "particularly egregious," this Court reversed the convictions for the state's "prejudicial misconduct." *Id.* at 380, 387.

After remand to the trial court, Mr. Allen filed a motion to dismiss the RCW 10.95.020 aggravating circumstances which the jury found the State had not proved beyond reasonable doubt. CP 103-16. The State responded that nothing precluded it from seeking to retry those allegations at a new trial. CP 117-33**.**

Relying upon United States Supreme Court precedent, the trial court concluded that facts which elevate the punishment for an offense are elements of a greater offense. Therefore, the court concluded, because the jurors' "unanimous opinion" was that the State had not proved those elements the State could not have another opportunity to do so. 8/7/15 RP 14. In denying the State's motion to reconsider, the trial court found "twelve jurors found you [the State] did not prove that during the course of the first trial" and ruled the State could not litigate that question anew. 10/13/15 RP 10.

The Court of Appeals granted discretionary review and affirmed the trial court's ruling.

D. ARGUMENT

1. Both the trial court and Court of Appeals correctly found the jury's acquittal on the greater offense precludes the State's effort to retry Mr. Allen on that offense.

The jury acquitted Mr. Allen of the greater offense of aggravated murder and convicted him of the lesser offense of first-degree murder. Following reversal of the first-degree murder convictions for prosecutorial misconduct, the trial court properly ruled the State could retry Mr. Allen for first-degree murder but double jeopardy barred retrial for aggravated first degree murder.

Where a jury acquits an individual of an offense jeopardy is complete and the acquittal bars retrial on that offense. *Richardson v. United States*, 468 U.S. 317, 325, 104 S. Ct. 3081, 82 L. Ed. 2d 242 (1984). However, if convictions on lesser offenses are reversed on appeal, for reasons other than insufficient evidence, the State may prosecute the individual anew on those lesser offenses but not the greater. *State v. Schoel*, 54 Wn.2d 388, 395, 397-98, 341 P.2d 481 (1959). This is because jeopardy has not terminated on those offenses. *United States v. Tateo*, 377 U.S. 463, 84 S. Ct. 1587, 12 L.Ed.2d 448 (1964).

Here, Mr. Allen's acquittal on the greater offense bars retrial on that offense. This Court's reversal of the convictions for the lesser offenses of first degree murder due to the prosecutor's misconduct permits

the State to prosecute those lesser offense at a new trial but not the greater offense. Both the trial court and Court of Appeals properly applied this rule.

The State insists, however, that no double jeopardy bar exists. Based on outdated case law, the State has argued aggravated murder is not a greater or even separate crime than first degree murder. The State's current position contradicts the language in the Amended Information which specifically charged Mr. Allen with committing the "crime of Aggravated First Degree Murder." CP 817-20. Despite this apparent contradiction the State contends the elements of aggravated first degree murder of which the jury acquitted Mr. Allen, are not really elements and that even if they are, double jeopardy does not apply. Caselaw demonstrates that the State is wrong on both counts.

a. Aggravating circumstances of aggravated first degree murder are elements of a greater offense.

It is no longer open to debate that

> Any fact that, by law, increases the penalty for a crime is an "element" that must be submitted to the jury and found beyond a reasonable doubt.

Alleyne v. United States, 570 U.S. 99, 103, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013); *State v. McEnroe,* 181 Wn.2d 375, 389-90, 333 P.3d 402 (2014). It is equally undebatable that the aggravating circumstances of

RCW 10.95.020 increase the penalty for the offense of aggravated first degree murder above that for first degree murder.

Indeed, the State does not contest this second point. Instead, the State has urged the courts to simply ignore it. The State contends that because a line cases from this Court, dating back to the decades preceding *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), concluded aggravator factors were not elements this Court must blindly follow those cases regardless of the contrary holding of the United States Supreme Court. This Court itself has recognized the reasoning of its pre-*Apprendi* cases, and the post-*Apprendi* case which rely on them, is inconsistent with *Apprendi* and its progeny. *McEnroe*, 181 W.2d at 389-90.

"When the United States Supreme Court decides an issue under the United States Constitution, all other courts must follow that Court's rulings." *State v. Radcliffe*, 164 Wn.2d 900, 906, 194 P.3d 250 (2008).

This Court should reconsider its "precedent not only when it has been shown to be incorrect and harmful but also when the legal underpinnings of [the Court's] precedent have changed or disappeared altogether." *W.G. Clark Const. Co. v. Pac. Nw. Reg'l Council of Carpenters*, 180 Wn.2d 54, 65, 322 P.3d 1207 (2014). Further, the "doctrine of stare decisis should not keep this court from fully considering

all United States Supreme Court guidance on federal issues, even when the newer cases have not directly overruled or superseded prior cases." *Id*. In *McEnroe* this Court already recognized its precedent was inconsistent with *Alleyne* and the cases which preceded it. *McEnroe*, 181 W.2d at 389-90

Facts which increase the punishment for an offense are elements of a greater offense. *Alleyne*, 133 S. Ct. at 2162 ("When a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense. . . ."). Aggravated first degree murder under RCW 10.95.020 has a minimum term of life in prison without the possibility of parole and a maximum penalty of death. The lesser offense of first degree murder carries a minimum term of 20 years in prison with a maximum term established by the individual's offender score, but in no circumstance may the penalty exceed life with the possibility of parole. RCW 9.94A.535; RCW 9.94A.540(1)(a). This Court's prior pronouncements that aggravated first degree murder is not a separate crime from first degree murder and that the circumstances set forth in RCW 10.95.020 are not elements of a separate greater offense are no longer supported by the United States Supreme Court's opinions. *Alleyne* plainly titles as an element of a greater crime any fact which increases either the minimum or maximum term for an offense. The

elements of RCW 10.95.020 increase both the minimum and maximum penalty for first degree murder they are elements of a greater offense.

b. *The jury acquitted Mr. Allen of the greater crime of aggravated first degree murder*.

With respect to the four counts of aggravated first degree murder the court provided the jury returned special verdicts forms asking "Has the State proven the existence of the following aggravating circumstance beyond a reasonable doubt?" On each the jury answered as follows:

ANSWER#1: NO (Write "yes" or "no." "Yes" requires unanimous agreement)

CP 2049-50.

The State insists this reveals the jury was not unanimous, because the jury was not instructed they must be unanimous to answer "no." Petition for Review 14-16. It is an extraordinary leap of logic to conclude the jury was not unanimous simply because the court did not expressly instruct them they must be unanimous to acquit. But, any confusion was resolved when the court polled the jury. Each juror answered yes to the question of whether the verdict was that of the jury as a whole and to the question whether it was the juror's verdict individually. 5/19/11 RP 3644-46. Thus, all 12 jurors unanimously answered that "No" on the special verdict was their individual verdict. Polling a jury is generally evidence of

jury unanimity. *State v. Lamar,* 180 Wn.2d 576, 587-88, 327 P.3d 46 (2014). Where "the jury was polled, there is no doubt that the verdict *was* unanimous and *was* the result of each juror's individual determination." *State v. Mickens,* 61 Wn.2d 83, 87, 377 P.2d 240 (1962) (Italics in original.); *State v. McNeal*, 98 Wn. App. 585, 596, 991 P.2d 649 (1999), *affirmed*, 145 Wn.2d 352 (2002).

The State has made no effort to explain why this rule does not apply here. The record establishes the jury unanimously agreed the State had not proved each of the elements of aggravated first degree murder.

The unanimous verdicts on the greater offense of aggravated first degree murder bars any effort to retry Mr. Allen on those charges. The State may however, despite its misconduct in the first trial, retry Mr. Allen on the four counts of first degree murder.

c. *Double Jeopardy protections apply equally to all elements and offenses and the lowers courts properly recognized the State is not free to ignore the jury's verdict.*

The undercurrent of the State's argument is that *Apprendi* is simply a Sixth Amendment case involving the jury-trial right, and thus, can have no bearing on the application of the Fifth Amendment Double Jeopardy Clause in this case. The State contends that because this Court's pre-*Apprendi* cases held the aggravating elements of RCW 10.95.020 were not elements, there is no bar to the State's effort to retry Mr. Allen on the

charge of aggravated first degree murder despite the jury's unanimous verdict.

The State's argument is just the sort of superficial reasoning that was the focus of this Court's self-criticism in *McEnroe.* 181 Wn.2d at 389-90. It is incorrect to categorize *Alleyne* or *Apprendi*, or any in that line of cases, as merely Sixth Amendment cases.

> At stake in this case are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without "due process of law," [Amendment] 14, and the guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury," [Amendment] 6

Apprendi, 530 U.S. at, 476–77. The Court made clear

> [The jury] right, in conjunction with the Due Process Clause, requires that each element of a crime be proved to the jury beyond a reasonable doubt. *United States v. Gaudin,* 515 U.S. 506, 510, 115 S. Ct. 2310, 132 L.Ed.2d 444 (1995); *In re Winship,* 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970).

Alleyne, 133 S. Ct. at 2156. Addressing the cases that preceded it, beginning with *Winship, Jones v. United States* explained these cases "recognize[] a question under both the Due Process Clause of the Fourteenth Amendment and the jury guarantee of the Sixth." *Jones v. United States*, 526 U.S. 227, 232, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999). *Jones* went further and recognized the question also arose under the Fifth Amendment Indictment Clause. *Id*. Thus, it is clear the rule that emerges from this line of cases addresses several separate constitutional

provisions: the Fifth Amendment Due Process and Indictment Clauses; the Fourteenth Amendment Due Process Clause, and the Sixth Amendment right to a jury. That rule is simply how courts will define an offense so as to apply an array of constitutional protections.

This line of cases from *Jones* to *Alleyne* rely on *Winship* demonstrating the interrelationship of these various constitutional provisions. *Winship* was a juvenile case and thus could not have rested upon the jury-trial right. Instead, *Winship* concluded the right to proof beyond a reasonable doubt of the offense flows from the Due Process Clause. Defining of what is an "element" rests on constitutional provisions beyond simply the right to a jury.

Properly understood, *Alleyne*, and the cases that came before it, are concerned with a far broader principle – "[t]he question of how to define a crime." 570 U.S. at 105. As *Jones* said:

> [m]uch turns on the determination that a fact is an element of an offense rather than a sentencing consideration, given that elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt

Jones, 526 U.S. at 232.

The Court in *Jones*, *Apprendi* and *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), did not expand the reach of the Fifth, Sixth or Fourteenth Amendments to non-offense facts,

instead, they simply applied those constitutional provisions to that which they had always applied – the elements of an offense. "The touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an "element" or "ingredient" of the charged offense." *Alleyne*, 133 S. Ct. at 2158. What *Apprendi* and its progeny have done is to adopt and regularly apply a straightforward test for determining the answer to the question of what constitutes an element of an offense for these various constitutional provisions. These decisions rejected the amorphous tests which had evolved in the time after *Winship*. In doing so, the Court has now categorically rejected the notion that the label attached to a fact – "element," "sentencing factor," "enhancement," "aggravator," or any other term – has any constitutional significance.

Blakely held Washington's exceptional sentence aggravating factors must be submitted to the jury and proved beyond a reasonable doubt because they were elements of an offense and not because the Court was creating a new rule under the Sixth and Fourteenth Amendments. *Jones* concluded the facts that increased the punishment of carjacking not only had to be proved to the jury beyond a reasonable doubt, but must be pleaded in the indictment as required by the Fifth Amendment because they were elements of the offense. The Court did not apply new constitutional protections to "sentencing factors" or "facts which

aggravate the punishment." Instead, the Court determined those facts were elements of an offense in the traditional sense regardless of their label. *Alleyne*, 133 S. Ct. at 2160. The label "aggravating factor" does not remove these traditional constitutional protections of those elements.

d. There is no constitutionally significant distinction between "elements" or "offenses" for purposes of the Fifth, Sixth and Fourteenth Amendments.

The State urges this Court to embrace the very logic the United Supreme Court has spent the last 15 years disavowing. The State urges the Court to apply the pre-*Apprendi* reasoning of this Court's decisions despite this Court's own recognition of its probable incorrectness. A unanimous Court acknowledged there is significant tension between its post-*Apprendi* decisions and subsequent decisions of the United State Supreme Court. *McEnroe*, 181 Wn.2d at 389-90. The Court acknowledged this tension has arisen because "[w]e have yet to fully weave *Apprendi* into the fabric of our caselaw" and instead the Court continues to rely on pre-*Apprendi* caselaw even when addressing post-*Apprendi* claims. *Id*.

Nonetheless, the State has contended throughout that these very cases, with their sweeping pre-*Apprendi* pronouncements that aggravating factors are not elements, must control in the face of United States Supreme Court cases to the contrary. Despite United States Supreme Court cases to the contrary, the State urges that it remains constitutionally significant that

the facts at issue here have previously been termed "minimum penalty factors" and not elements. Petition at 6-9. Based entirely upon the name previously attached to a certain factual finding, "minimum sentencing factor," the State contends Double Jeopardy protections cannot apply.

The elements of an offense for purposes of the proof beyond a reasonable doubt requirement of the Fifth and Fourteenth Amendment Due Process Clauses and the Fifth Amendment Indictment Clause are no different from the elements of that offense for purposes of the Fifth Amendment Double Jeopardy Clause. The Fifth Amendment Double Jeopardy Clause applies to the states by virtue of the Fourteenth Amendment Due Process Clause, the same Due Process Clause which *Winship* concluded requires states to prove the elements of the offense beyond a reasonable doubt. That is the same clause which *Apprendi* and *Blakely* concluded requires the government to prove the elements of the offense to a jury. It defies logic to contend the same clause employs different tests when determining what constitutes an "offense" when it applies the Double Jeopardy Clause to the States than when it applies the rights to a jury and proof beyond a reasonable doubt. The United States Supreme Court itself has said:

> We see no constitutional difference between the meaning of the term "offense" in the contexts of double jeopardy and of the right to counsel.

Texas v. Cobb, 532 U.S. 162, 173, 121 S. Ct. 1335, 149 L. Ed. 2d 321 (2001).

If the "offense" to which the Double Jeopardy Clause applies is different from the "offense" to which the Sixth Amendment jury right applies would mean the definition of "offense" changes within the Sixth Amendment itself: "offenses" to which the right to counsel applies (as do double jeopardy protections) and "offenses" to which the right to a jury applies. But that is not the end of it. Since it is clear the Due Process and Indictment Clauses of the Fifth Amendment share a common definition of "offense" with the jury provisions – one must then conclude that within the Fifth Amendment, too, the meaning of "offense" changes between the Double Jeopardy Clause and the Indictment or Due Process Clauses.

In summary, facts which increase the punishment for an offense are elements of a greater offense. *Alleyne,* 133 S. Ct. at 2162. Such facts are significant for purposes of the Fifth, Sixth, and Fourteenth Amendments, and the meaning of "element" and "offense" is the same for purposes of all provisions:

- It is the same for purposes of the Sixth Amendment right to a jury trial and Fourteenth Amendment right to due process. *Apprendi*, 530 U.S. at 476-77.

- It is the same for purposes of the Sixth Amendment right to a jury trial and Fifth Amendment indictment clause and due process clause. *Jones*, 526 U.S. at 232.

- It is the same for purposes of the Sixth Amendment right to counsel and the Fifth Amendment right to be free from double jeopardy. *Cobb*, 532 U.S. at 173.

It would be anomalous to hold that the meaning of "offense" is the same for purposes of the Sixth Amendment right to counsel and Fifth Amendment right to be free from double jeopardy, yet *different* from the meaning of "offense" that applies to other provisions *within the same Amendments*. But that is what the State asks this Court to hold. This Court should reject the invitation.

Blakely stated its application of *Apprendi*:

> reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure.

Blakely, 542 U.S. at 305–06. The requirements that a fact must be submitted to the jury and proved beyond reasonable doubt have little force if the State may simply disregard a jury verdict it does not like as the State wishes to do here. The requirements are hollow if the State may successively submit that "fact" to a jury or juries until it receives the verdict it does like. Rather than act as "the great bulwark" against oppressive prosecutions, the rights are reduced to mere procedural formalities which are easily circumvented.

The trial court properly ruled the State could not ignore the jury's verdict and retry Mr. Allen of the offense of aggravated first degree murder following his acquittal on that offense. This Court should affirm.

e. Existing caselaw does not preclude application of the Double Jeopardy Clause to previously prosecuted offenses.

The State cites the Supreme Court's decision in *Monge v. California*, 524 U.S. 721, 118 S. Ct. 2246, 141 L. Ed. 2d 615 (1998) for the broad proposition that the State is free to ignore the jury's verdict. Petition at 9-10. *Monge* said:

> Historically, we have found double jeopardy protections inapplicable to sentencing proceedings because the determinations at issue do not place a defendant in jeopardy for an "offense."

524 U.S. at 728 (Internal citations omitted). But, Mr. Allen does not seek to apply double jeopardy provisions to sentencing proceedings. In fact, he was never sentenced for aggravated first degree murder. The verdict which the State wishes to ignore was issued by a jury following trial, not at a sentencing proceeding. After a prior jury trial resulted in a unanimous verdict against the State on an element of an offense, double jeopardy provisions prevent the State from submitting that same element and offense to a second jury. That is within the traditional reach of the Double Jeopardy Clause.

As set forth above, the facts determined in the jury's verdict in Mr. Allen's case do constitute an element of an "offense." *Monge*, by contrast, did not concern an element of an offense at all. At issue in that case was whether the State could appeal a finding that it had not adequately proved a defendant's criminal history under California's three-strike law. 524 U.S. at 725-27. Prior convictions are not elements of an offense. *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998); *State v. Wheeler*, 145 Wn.2d 116, 121, 34 P.3d 799 (2001). That remains true even after *Apprendi*. 530 U.S. at 490. Because they are not elements of an offense the State's appeal of the criminal history finding did not place the individual twice in jeopardy for the same "offense." The same cannot be said of the State's effort here to cast aside the prior jury's verdict on an element.

Monge observed:

> the Court has rejected an absolute rule that an enhancement constitutes an element of the offense any time that it increases the maximum sentence to which a defendant is exposed.

524 U.S. at 729. After the string of cases including *Apprendi*, *Blakely* and *Alleyne*, that is no longer the case as the Court has in fact embraced the rule that an enhancement, other than the prior convictions at issue in *Monge*, is an element of a greater "offense" any time it increases either the minimum or maximum sentence to which a defendant is exposed.

Monge made clear the determination of whether double jeopardy applied turned on the question of whether the fact at issue constitutes an element of an "offense." The fact at issue here is an element of an offense. Thus, the Double Jeopardy Clause applies.

Nonetheless, *Monge* is often cited, as the State does here, as precluding application of double jeopardy principles to any verdict on a fact not titled an element. For example it appears in dicta in *State v. Nunez*, for the broad proposition that the State is free to retry an aggravator. *State v. Nunez*, 174 Wn.2d 707, 717, 285 P.3d 21 (2012). *Nunez* proclaimed "[b]ut proving the elements of an offense is different from proving an aggravating circumstance. *Id*. That statement is precisely the sort of broad pronouncement that *McEnroe* disavowed. Indeed, there is no relevant constitutional distinction between the titles attached to those facts, nor is there any difference in the manner or quantity of proof required to establish them. Further, as discussed, *Monge* did not concern an element, an aggravating factor, or any fact that is subject to the Fifth and Sixth Amendment. Instead, *Monge* concerned only an effort to appeal an adverse finding regarding criminal history, a fact which is not an

element of any offense and does not implicate any of the constitutional provisions at stake.[2]

In *Sattazahn v. Pennsylvania*, 537 U.S. 101, 123 S. Ct. 732, 154 L. Ed. 2d 588 (2003), a trial on first degree murder with aggravating circumstances, a capital offense, resulted in a guilty verdict with respect to the elements of first degree murder but a hung jury on the aggravating factor. The trial court entered a conviction on first degree murder. After the conviction was reversed on appeal the State again sought a conviction on aggravated first degree murder. Mr. Sattazahn contended the Double Jeopardy Cause precluded retrial on the greater offense.

All nine justices agreed the Fifth Amendment Double Jeopardy Clause applied to jury determinations of aggravating factors. Five justices concluded that while jeopardy attached it had not terminated because the jury hung on the aggravating factor and thus retrial was not barred. *Id*. at 107-08; *Id*. at 116 (O'Connor, J. concurring in part). The opinion states the first jury

> made no findings with respect to the alleged aggravating circumstance. That result-or more appropriately, that non-result-cannot fairly be called an acquittal based on findings sufficient to establish legal entitlement to the life sentence.

[2] The outcome of *Nunez* that a "no" verdict on an aggravator must be unanimous is nonetheless correct, even if its reasoning is not. Because it is an element the jury's verdict on an "aggravating factor" must be unanimous, as it was here.

Id. at 109. The remaining four justices concluded jeopardy terminated upon the trial court's imposition of a life sentence, and thus concluded retrial on the aggravators was barred. 537 U.S. at 119 (Ginsberg, J. dissenting).

However, three of the five justices in the majority explained their opinion would be different had the jury acquitted the defendant of the additional element. In that case, double jeopardy plainly would bar retrial on the greater crime.

> For purposes of the Double Jeopardy Clause, then, "first-degree murder" under Pennsylvania law-the offense of which petitioner was convicted during the guilt phase of his proceedings-is properly understood to be a lesser included offense of "first-degree murder plus aggravating circumstance(s)." Thus, if petitioner's first sentencing jury had unanimously concluded that Pennsylvania failed to prove any aggravating circumstances, that conclusion would operate as an "acquittal" of the greater offense-which would bar Pennsylvania from retrying petitioner on that greater offense (and thus, from seeking the death penalty) on retrial.

Sattazahn, 537 U.S. at 112-13 (Internal citations omitted).

The four justice dissent held found the Double Clause applied and jeopardy terminated with the first jury's verdict. *Sattazahn*, 537 U.S. at 119 (Ginsberg, J. dissenting.).

Thus, seven justices concluded that if the facts were as they are here, Double Jeopardy would bar retrial. Critically, while the jury in *Sattazahn* was hung 9-3 on the additional element, the jury in Mr. Allen's

first trial was not. This is exactly the scenario addressed by the three judge plurality, identifying when they, like the four-justice dissent, would find jeopardy had terminated not only to preclude the death penalty but to preclude retrial altogether.

The State contends several of this Court's opinions foreclose reliance on a traditional double jeopardy analysis. Petition for Review at 6-7 (citing *State v. Kelly*, 168 Wn.2d 72, 226 P.3d 773 (2010)); Brief of Appellant at 8-9 (citing e.g. *State v. Benn*, 161 Wn.2d 256, 165 P.3d 1232 (2007)). As an initial matter, neither case resembles this case. More importantly, neither case endorsed the State's current position that it is free to ignore the prior jury's verdict. Indeed, the State has yet to cite a single case that establishes the State's ability to simply ignore a jury's acquittal.

Benn involved a retrial after the prior jury had not returned a verdict on one of two charged aggravating factors. 161 Wn.2d at 260. After the initial conviction was reversed, the State retried Mr. Benn on aggravated first degree murder but only with respect to the aggravating factor on which the jury had not returned a verdict. *Id*. Without a verdict on the second additional element, retrial on that element is entirely permissible under settled double jeopardy law.

Kelly did not involve repeated prosecutions as does Mr. Allen's case. Rather the Court simply looked at whether the legislature had authorized multiple punishment in single prosecution based upon single fact. 168 Wn.2d at 77. That is a separate component of double jeopardy analysis than at issue in *Sattazahn* and at issue here. *See North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 l. Ed. 2d 656 (1969) (explaining double jeopardy applies to multiple prosecutions for the same offense or multiple punishments for the same offense).

As *McEnroe* observed, despite its failure to "fully weave *Apprendi* into the fabric of [its] caselaw, the outcomes may well be correct despite the broad pronouncements of distinctions between elements and aggravators." *McEnroe*, 181 Wn.2d at 389. That is true of the holding in *Nunez* regarding the need for unanimity for verdicts on aggravators. *Benn's* allowance of retrial on an aggravator for which the jury did not return a verdict may also be correct. The correctness of those conclusions rests on traditional constitutional and procedural law and not a constitutional distinction between elements and aggravators as none exists.

f. *The trial court properly found the State could not disregard the prior jury's unanimous verdict*.

The State claims that constitutional rights rise and fall based solely upon the name attached to a particular proceeding or particular fact. The

United States Supreme Court has repeatedly rejected such arguments. The trial court properly recognized that as a matter of federal constitutional law the State could not ignore the jury's unanimous verdict following the first trial.

2. The common-law doctrine of collateral estoppel provides an alternative basis to affirm the trial court's conclusion that the State cannot ignore the prior jury's unanimous verdict.

a. The jury entered a unanimous "No" verdict regarding the aggravating elements in the first trial.

The doctrine of collateral estoppel generally bars a party from litigating a factual question if that factual issue was decided adversely to the party in a previous proceeding. *State v. Williams,* 132 Wn.2d 248, 254, 937 P.2d 1052 (1997). Four criteria must be satisfied:

> (1) the issue decided in the prior adjudication must be identical with the one presented in the second; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea of collateral estoppel is asserted must have been a party or in privity with a party to the prior litigation; and (4) application of the doctrine must not work an injustice.

In re the Personal Restraint of Moi, 184 Wn.2d 575, 580, 360 P.3d 811 (2015) (citing *Williams,* 132 Wn.2d at 254). The rule in criminal cases is identical to that in civil cases. *See Christensen v. Grant County Hospital Dist. No. 1*, 152 Wn.2d 299, 307, 96 P.3d 957 (2004) (citing *inter alia*

Williams, 132 Wn.2d at 254). Application of the doctrine reveals an independent basis to affirm the trial court.

The issues and parties in the prior trial and current trial are identical and the prosecutor wishes to allege the very same aggravating factors which it alleged and which the jury rejected in the first trial of Mr. Allen. That trial ended with a final adjudication on the merits of those facts. The jury returned special verdicts answering "No" to the questions "Has the State proven the existence of the following aggravating circumstance beyond a reasonable doubt?"

"A special verdict by a jury 'actually decides' the fact for future prosecutions." *State v. Eggleston*, 164 Wn.2d 61, 72, 187 P.3d 233 (2008). The jury's unanimous verdicts on the aggravating elements are final determinations of the issues. Because the jury finally determined the factual issue in a prior trial involving the same parties the first three criteria are met.

The final criteria addresses whether application of collateral estoppel would "work an injustice" and is "concerned with procedural, not substantive irregularity." *Thompson v. Department of Licensing*, 138 Wn.2d 783, 795–99, 982 P.2d 601 (1999). This focus addresses the concern that the party against whom the doctrine is asserted must have had

a full and fair opportunity to litigate the issue in the first proceeding. *Christensen*, 152 Wn.2d at 309.

The State cannot possibly contend that the more than seven-week trial did not afford it a full and fair opportunity to ligate the factual issue. Indeed, those issues were fully litigated but in the end decided by a unanimous jury against the State. It would be patently unfair to permit the reversal occasioned by the State's own egregious misconduct to allow the State another opportunity to litigate these issues.

Each of the elements of collateral estoppel is satisfied. Moreover, as detailed in Mr. Allen's briefing to the Court of Appeals and in his Answer, while collateral estoppel is embodied in double jeopardy protections it exists in broader form as a matter of the common law.

United States v. Oppenheimer, 242 U.S. 85, 87, 37 S. Ct. 68, 61 L. Ed. 161 (1916); *Sealfon v. United States*, 332 U.S. 575, 578-79, 68 S. Ct. 237, 92 L. Ed. 180 (1948). This Court has explained, "[d]ouble jeopardy and collateral estoppel are often confused, and have some similarities, and also substantial differences." *State v. Morlock*, 87 Wn.2d 767, 768, 557 P.2d 1315 (1976); *see also*, *State v. Barton*, 5 Wn.2d 234, 240, 105 P.2d 63 (1940).

Ashe v. Swenson concluded the Fifth Amendment Double Jeopardy Clause as applied to the states through the Fourteenth Amendment Due

Process Clause, embodied the common-law doctrine of collateral estoppel. 397 U.S. 436, 443, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970). The United States Supreme Court does not define state common law, nor for that matter state constitutional law which affords greater protections than mandated by the federal constitution. *State v. Johnson*, 188 Wn.2d 742, 758-59, 399 P.3d 507 (2017). When *Ashe* concluded collateral estoppel was embodied in the Double Jeopardy Clause it did not supplant the existing common law in States, such as Washington, which already applied the doctrine to criminal cases.

"Collateral estoppel, or issue preclusion . . . precludes the same parties from relitigating issues actually raised and resolved by a former verdict and judgment." *State v. Harrison*, 148 Wn.2d 550, 560-61, 61 P.3d 1104 (2003). The doctrine does not permit the State to ignore the jury's unanimous verdict.

b. *Because the State is collaterally estopped from relitigating factual issues decided against it by the previous jury, this Court should affirm the trial court's order.*

The ruling of the Court of Appeals commissioner granting review in this matter refused to address the collateral estoppel argument solely because it was not raised below. Ruling at 4, n.1. That reasoning is contrary to RAP 2.5(a)

That rule provides:

> A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground.

Id.; *see also*, *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259, 282, 96 P.3d 386 (2004) (court can affirm a lower court's decision on any basis adequately supported by the record).

Here, the record fully establishes the elements for collateral estoppel. That doctrine provides a separate basis for affirming the trial court's order even though that argument was not presented to the trial court. This Court should affirm the trial court's order.

E. CONCLUSION

For the reasons above this Court should affirm the trial court and Court of Appeals and conclude the State may not disregard the prior acquittal.

Respectfully submitted this 15th day of June, 2018.

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Petitioner, v. DORCUS ALLEN, Respondent.	)))))))))	NO. 95454-2

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